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Attorneys for Defendant/Counter-Plaintiff,
 KEATING DENTAL ARTS, INC.

IN THE UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL
 CERAMICS, INC. dba GLIDEWELL
 LABORATORIES,

Plaintiff,

v.

KEATING DENTAL ARTS, INC.

Defendant.

AND RELATED COUNTERCLAIMS.

Civil Action No.
 SACV11-01309-DOC(ANx)

Honorable David O. Carter

**DEFENDANT AND
 COUNTER-PLAINTIFF
 KEATING DENTAL ARTS,
 INC.'S NOTICE OF MOTION
 AND MOTION IN LIMINE
 TO EXCLUDE UNTIMELY
 WEB PAGE EVIDENCE
 (MOTION IN LIMINE NO. 5)**

Trial Date: February 26, 2013
 Time: 8:30 a.m.
 Location: Courtroom 9D

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on February 26, 2013, at 8:30 a.m., or as
 3 soon thereafter as the matter may be heard by the Honorable David O. Carter of the
 4 United States District Court for the Central District of California, Southern
 5 Division, at 411 West Fourth Street, Courtroom 9D, Santa Ana, CA, 92701,
 6 Defendant and Counter-Plaintiff Keating Dental Arts, Inc. ("Keating" or
 7 "Defendant") will move and hereby does move for an order excluding from trial
 8 evidence of third party web pages introduced by Plaintiff and Counter-Defendant
 9 James R. Glidewell Dental Ceramics, Inc. after the discovery cut-off. Such
 10 evidence is untimely and should be excluded pursuant to Federal Rule of Civil
 11 Procedure ("F.R.C.P.") 37(c)(1).

12 This motion is based upon this Notice, the accompanying Memorandum of
 13 Points and Authorities, all pleadings, papers, and records on file in this action, all
 14 matters of which the Court may take judicial notice, and such further written and
 15 oral argument as may be presented to the Court.

16 Respectfully submitted,

17 KNOBBE, MARTENS, OLSON & BEAR, LLP

18
 19 Dated: January 17, 2013

By: /s/ David G. Jankowski

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24 Attorneys for Defendant and Counter-Plaintiff
 25 KEATING DENTAL ARTS, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant and Counter-Plaintiff Keating Dental Arts, Inc. (“Keating” or “Defendant”) hereby moves for an order *in limine* to exclude from trial evidence of third party web pages introduced after the discovery cut-off. Plaintiff and Counter-Defendant James R. Glidewell Dental Ceramics, Inc. (“Glidewell”) introduced third party web page evidence through the Declaration of Deborah S. Mallgrave (“Mallgrave”) in Support of Glidewell’s Oppositions to Keating’s Motions for Summary Judgment. (Docket. No. 116-1, Ex. Y.) Mallgrave’s Declaration was filed a month after discovery had closed. Thus, Glidewell’s third party web page evidence is untimely and should be excluded pursuant to F.R.C.P. 37(c)(1).

II. RELEVANT BACKGROUND

As stated in the Court’s Scheduling Order (Docket No. 15), the discovery cut-off date was October 29, 2012. On October 29, 2012, Glidewell filed an *Ex Parte* Application to Amend Scheduling Order to extend discovery deadlines. (Docket No. 69.) The Court denied Glidewell’s *Ex Parte* Application on November 9, 2012 and refused to extend the discovery or expert disclosure deadlines. (Docket No. 74.) Despite the Court’s order, Glidewell continued to produce new information and witnesses in violation of F.R.C.P. 37(c). In its motions for summary judgment and oppositions to Keating’s motions for summary judgment, Glidewell relied on several witnesses and documents not produced prior to the close of discovery.

Specifically, on November 26, 2012, a month after the discovery cut-off, Glidewell filed the Declaration of Mallgrave, attorney for Glidewell, in Support of Glidewell’s Oppositions to Keating’s Motions for Summary Judgment. (Docket. No., 116 Ex. Y.) Mallgrave’s Declaration introduced previously undisclosed documents of third party web pages. Glidewell’s untimely production of web page documents was an improper attempt to continue discovery after discovery had

1 closed, and after the Court had refused to extend discovery deadlines. (Docket No.
2 74.)

3 **III. THE THIRD PARTY WEB PAGE EVIDENCE IS UNTIMELY AND**
4 **SHOULD BE EXCLUDED PURSUANT TO F.R.C.P 37(C)(1)**

5 A party has a duty to “supplement or correct its disclosure or response” in a
6 timely fashion if the party’s initial responses are incomplete or incorrect. Fed. R.
7 Civ. P. 26(e). “If a party fails to provide information or identify a witness as
8 required by Rule 26(a) or (e), the party is not allowed to use that information or
9 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure
10 was substantially justified or is harmless.” F.R.C.P. 37(c)(1).

11 Here, all the third party web page documents referenced in Mallgrave’s
12 declaration were generated for the first time on November 26, 2012, almost a month
13 after the discovery cutoff deadline of October 29, 2012. Accordingly, pursuant to
14 F.R.C.P. 37(c)(1), the evidence of the third party web pages must be excluded from
15 trial unless Glidewell can show a “substantial justification” for its failure to timely
16 disclose the third party web page documents, or show that its violation was
17 harmless. *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th
18 Cir. 2001).

19 Glidewell has not offered sufficient justification for its failure to timely
20 disclose the third party web page documents referenced in Mallgrave’s Declaration.
21 The only explanation given by Glidewell in its *Ex Parte* Application (which the
22 Court denied) for its numerous untimely litigation and discovery maneuvers was
23 that Glidewell’s prior counsel had not been diligent. (Docket No. 69 at 1.)
24 However, lack of diligence is not an excuse for ignoring the Court’s scheduling
25 orders. *Wong v. Regent of University of California*, 410 F.3d 1052, 1062 (9th Cir.
26 2005). Accordingly, Glidewell’s untimely third party web page evidence should be
27 excluded pursuant to F.R.C.P. 37(c)(1).

28 ///

IV. CONCLUSION

For the foregoing reasons, Keating requests an order excluding from trial all evidence of third party web pages introduced by Glidewell after discovery closed.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 17, 2013

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